IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of: Anjali Chandnani et al.

Serial No.:   09/905,343

Filing Date: July 14, 2001

Group Art Unit: 2137

Examiner: Michael J. Pyzocha

Confirmation No.:   3770

Title: DETECTION OF POLYMORPHIC SCRIPT LANGUAGE VIRUSES BY DATA DRIVEN LEXICAL ANALYSIS

Mail Stop Notice of Appeal
Commissioner of Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Dear Sir:

PRE-APPEAL BRIEF REQUEST FOR REVIEW

The following Pre-Appeal Brief Request for Review is being filed in accordance with the provisions set forth in the Official Gazette Notice of July 12, 2005 ("OG Notice"). Pursuant to the OG Notice, this Request is being filed concurrently with a Notice of Appeal.

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REMARKS

In a final Office Action mailed July 21, 2008 (the "Final Office Action") and an Advisory Action mailed September 25, 2008 (the "Advisory Action") Claims 1-14, 16-22, and 24 were rejected. Applicants seek review of the rejection of Claim 24. Applicants do not seek review in this request of the rejections of Claims 1-14 and 16-22. Applicants request a finding that the rejection of Claim 24 is improper.

Section 103 Rejections

The Final Office Action rejects Claim 24 under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent No. 6,711,583 to Chess et al. ("*Chess*") in view of U.S. Patent No. 5,881,151 to Yamamoto ("*Yamamoto*") and further in view of Van De Vanter ("*Van De Vanter*"). Applicants respectfully traverse these rejections.

Claim 24 is directed to a method that includes receiving a data stream. The data stream is lexically analyzed to identify a script language. Language description data is received for the script language. The data stream is lexically analyzed using the language description data to generate a stream of tokens. Viral code detection data is generated by analyzing a plurality of samples of polymorphic script language viral code. The stream of tokens is lexically analyzed using the viral code detection data and the language description data to identify at least one script language virus. The references do not teach or suggest these limitations.

Claim 24 is allowable at least because the cited references fail to teach or suggest "generating viral code detection data by analyzing a plurality of samples of polymorphic script language viral code." The Final Office Action contends that Column 4, lines 22-61 of *Chess* discloses "preparing detection data for viral code corresponding to the script language virus." *See* Final Office Action, Pages 2-3. However, even assuming for the sake of argument that the cited portion discloses **preparing detection data** (which Applicants do not concede), at no point does *Chess* teach or suggest generating viral code detection data **by analyzing a plurality of samples of polymorphic script language viral code**. Indeed, even the Final Office Action concedes that the *Chess-Yamamoto-Van De Vanter* combination fails to explicitly disclose "samples of viral code." *See* Final Office Action, Page 6.

Claim 24 is allowable also at least because the cited references fail to teach or suggest "lexically analyzing the stream of tokens using the viral code detection data and the language description data to identify at least one script language virus." The Final Office Action concedes that *Chess* "fails to explicitly disclose the use of lexical analysis as part of the virus detection." *See* Final Office Action, Page 3. Instead, the Final Office Action contends that *Yamamoto* discloses "analyzing the stream of tokens using the detection data and the language description data to identify the virus" and *Van De Vanter* discloses "lexically analyzing a stream of tokens." *See* Final Office Action, Page 3. Applicants respectfully disagree. *Yamamoto* discloses generating tokens and merely **performing a syntax analysis on the tokens**. *See Yamamoto*, Column 4, lines 64-66. For example, *Yamamoto* discloses performing the syntax analysis "to check whether or not each token is present at a grammatically correct position." *See Yamamoto*, Column 5, lines 11-13. *Yamamoto* does not teach or suggest analyzing the stream of tokens **using viral code detection data** and the language description data. *Van De Vanter* fails to cure this deficiency.

Moreover, the Examiner has failed to establish a *prima facie* case for obviousness, because the Examiner has failed to provide a clear articulation of the reason(s) why the claimed invention would have been obvious to one of skill in the art. The U.S. Supreme Court's recent decision in *KSR Int'l Co. v. Teleflex, Inc.* reiterated the requirement that Examiners provide an explanation as to why the claimed invention would have been obvious. *KSR Int'l Co. v. Teleflex, Inc.*, 127 S.Ct. 1727 (2007). The analysis regarding an apparent reason to combine the known elements in the fashion claimed in the patent at issue "should be made explicit." *Id.* at 1740-41. "Rejections on obviousness grounds cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness." *Id.* at 1741 (internal quotations omitted).

Far from an explicit, articulated reasoning with some rational underpinning, the Examiner simply offers mere conclusory speculation that "it would have been obvious to a person of ordinary skill in the art to use the lexical analysis of a stream of tokens to detect the script viruses of the modified Chess et al. and Yamamoto system. Motivation to do so would have been detect [sic] changes to the stream of tokens." *See* Final Office Action, Pages 3-4. According to the controlling case law, rules, and guidelines, this type of hindsight analysis,

using Applicants' claims as a roadmap for summarizing references—in this case mischaracterizing references without even citing particular portions—is impermissible. *See* M.P.E.P. § 2142; *KSR*, 127 S.Ct. at 1740-41; *Examination Guidelines*, 72 Fed. Reg. at 57528-29.
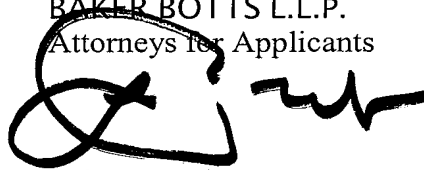
For at least the reasons above, Applicants respectfully contend that Claim 24 is patentably distinguishable from the cited references. Thus, Applicants respectfully submit that the rejection of Claim 24 under 35 U.S.C. § 103(a) is improper.

CONCLUSION

As the rejections of Claim 6 contain clear legal and factual deficiencies, Applicants respectfully request a finding of allowance of Claim 6. If the PTO determines that an interview is appropriate, Applicants would appreciate the opportunity to participate in such an interview. To the extent necessary, the Commissioner is hereby authorized to charge any required fees or credit any overpayments to Deposit Account No. **02-0384** of **Baker Botts L.L.P.**

Respectfully submitted,

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